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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Develop an Electricity Integrated Resource Planning Framework and to Coordinate and Refine Long-Term Procurement Planning Requirements.	R.16-02-007 (Filed February 11, 2016)

JOINT RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY (U 39-E), SAN DIEGO GAS & ELECTRIC COMPANY (U 902-M), AND SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) TO MOTION OF THE CITY OF LANCASTER, MARIN CLEAN ENERGY AND SONOMA CLEAN POWER AUTHORITY FOR OFFICIAL NOTICE

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE

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Pursuant to Rule 11.1(e) of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission"), Pacific Gas and Electric Company ("PG&E"), San Diego Gas & Electric Company ("SDG&E"), and Southern California Edison Company ("SCE") (collectively, the "Joint Utilities") respectfully submit this response to the Motion of the City of Lancaster, Marin Clean Energy and Sonoma Clean Power Authority (collectively, the "CCA Parties") for Official Notice ("CCA Parties' Motion").[1]

I.

INTRODUCTION AND OVERVIEW

On October 7, 2016, the CCA Parties filed a motion requesting that the Commission "take official notice of future load growth among operational [community choice aggregation ('CCA')] programs, and the growing number of communities formally exploring and planning CCA programs, including communities that are planning to launch or join CCA programs in the

[1] Pursuant to Rule 1.8(d) of the Commission's Rules of Practice and Procedure, counsel for PG&E and SDG&E have authorized SCE to file this response on their behalf.

2017-2018 timeframe."[2] Specifically, the CCA Parties ask the Commission to take official notice of the facts contained in Table 1.1 of their motion, which they claim shows "the launch date and expected load forecast of CCA programs that have either formed already or are anticipated to launch within the 2017-2018 timeframe and have prepared official forecasts," and a list of city and counties they assert "have passed resolutions or taken other formal action to explore CCA programs, or taken affirmative, formal steps to launch a CCA program within the 2017-2018 timeframe."[3]

The Joint Utilities agree with the CCA Parties that there is growing interest in CCA programs in a number of communities. Moreover, the Joint Utilities support a regulatory process that addresses the growth of CCA programs and the effects of that growth on utility bundled service customers. However, the Commission should deny the CCA Parties' Motion for the reasons stated herein. In particular, while the facts presented in the motion, if determined to be accurate, could potentially be relevant at a later point in the proceeding, the CCA Parties have not demonstrated the facts are relevant to an issue ***currently*** being considered in this Integrated Resource Planning ("IRP") proceeding. Additionally, the CCA Parties' Motion does not establish that these facts meet the requirements for granting official notice. Because the CCA Parties are requesting official notice of facts, they must establish that these facts are "not reasonably subject to dispute" and "are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."[4] The CCA Parties' Motion does not meet this burden.

The CCA Parties' purpose for seeking official notice is unclear. If and when the facts included in the CCA Parties' Motion become relevant to an issue being considered in this proceeding, the appropriate process for the CCA Parties to introduce evidence into the record is to submit testimony where any disputed facts could be subject to cross-examination by other

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[2] CCA Parties' Motion at 1.
[3] *Id.* at 4-6.
[4] Cal. Evid. Code § 452(h).

parties. The CCA load forecasts and information about potential CCA programs and their expected launch dates and loads included in the CCA Parties' Motion should not be treated as officially noticed, undisputed facts that cannot be contested in later portions of this proceeding, especially given that the parties have not yet submitted any testimony or other evidence into the record in this proceeding.[5]

Furthermore, requesting official notice of future load growth of CCA programs and/or communities that are exploring or planning to launch or join CCA programs is not a substitute for a CCA submitting a Binding Notice of Intent ("BNI") to serve specified customer classes on a specific date.[6] If a CCA submits a BNI, it has taken on a binding legal obligation to procure power for the customers identified in the BNI and the incumbent utility can rely on that commitment and cease procuring for those customers. Conversely, if a CCA does not submit a BNI and merely announces an implementation plan or other future plans, the incumbent utility must continue to procure for those customers until the CCA submits a BNI or customer accounts are transferred to the CCA during automatic enrollment.

The Commission recently reiterated this standard in Decision ("D.") 16-09-044, stating:

> Electric Rule No. 23.2 for California [investor-owned utilities ("IOUs")] was created for the purpose of mitigating [Cost Responsibility Surcharge] charges and transfers the legal responsibility for electrical power procurement from the IOU to the CCA. By submitting the BNI, the CCA commits to providing electrical power for its customers and the IOU can stop procuring power for those customers. The commission created the BNI process with input from parties and stakeholders to transfer the legal responsibility of customer power procurement, this process cannot be replaced by the filing of an implementation plan. If the CCA chooses not to participate in the BNI process, its customers must then assume the risk for all IOU power purchased up to the CCA's initiation of service.[7]

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5 The Joint Utilities also note that the CCA Parties are requesting official notice of load forecasts and information regarding other CCAs and communities, who may or may not be parties to this proceeding.

6 *See* PG&E Electric Rule 23.2; SDG&E Electric Rule 27.2; SCE Electric Rule 23.2.

7 D.16-09-044 at 16. *See also id.* at Ordering Paragraphs 1-4 (addressing the effects of submitting a BNI on Power Charge Indifference Adjustment vintage dates).

In its ruling on the CCA Parties' Motion, the Commission should make clear that a motion for official notice is not a substitute for a BNI and has no effect on the utilities' obligation to procure power for their customers, the Commission's planning responsibilities, or applicable departing load charges.

II.

THE COMMISSION SHOULD DENY THE CCA PARTIES' MOTION

A. Standard for Official Notice

Rule 13.9 of the Commission's Rules of Practice and Procedure states that "[o]fficial notice ***may*** be taken of such matters as may be judicially noticed by the courts of the State of California pursuant to Evidence Code section 450 et seq."[8] Evidence Code Section 452 provides that California courts ***may***, but are not required to, take judicial notice of several matters. The CCA Parties rely on Evidence Code Section 452(b), which permits courts to take judicial notice of "[r]egulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States," and Evidence Code Section 452(h), which allows courts to take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

Although courts may judicially notice a variety of matters set forth in the Evidence Code, "only ***relevant*** material may be noticed."[9] Judicial notice "is always confined to those matters which are relevant to the issues at hand."[10] Like the California courts, the Commission has held that matters must be relevant to be officially noticed.[11]

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[8] Emphasis added.

[9] *Mangini v. R.J. Reynolds Tobacco Co.*, 7 Cal. 4th 1057, 1063 (1994) (emphasis in original), overruled on other grounds in *In re Tobacco Cases II*, 41 Cal. 4th 1257 (2007).

[10] *Id.* (quoting *Gbur v. Cohen*, 93 Cal. App. 3d 296, 301 (1979)).

[11] *See, e.g.*, D.10-09-004 at 5 (referencing denial of official notice of facts not shown to be relevant); D.02-07-043 at 37-39 (declining to take official notice of documents because it was not established that they were relevant and material to the proceeding).

Moreover, even if the existence of a document is judicially noticeable, "the truth of statements contained in the document and its proper interpretation are not subject to judicial notice if those matters are reasonably disputable."[12] As the California Supreme Court stated:

> [T]he taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom, since in many instances what is being noticed, and thereby established, is no more than the existence of such acts and not, without supporting evidence, what might factually be associated with or flow therefrom.[13]

The Commission has agreed, reasoning:

> We make the distinction that taking official notice of the existence of documents should not be confused with taking notice of the truth of the contents. We are mindful that judicial notice of the truth of the content of a court or agency file is proper only "when the existence of the record itself precludes contravention of that which is recited in it…." *Columbia Casualty Co. v. Northwestern Nat'l Ins. Co.* (1991) 231 Cal. App. 3d 457, 473 (court may not properly take judicial notice of contents of court papers filed in support of motion for summary judgment). Judicial notice of a document's content is inappropriate in other instances because the truth of a document's content is reasonably subject to dispute or constitutes hearsay. *Id. See also Garcia v. Sterling* (1985) 176 Cal. App. 3d 17, 22 ("Although the existence of statements contained in a deposition transcript filed as part of a court record can be judicially noticed, their truth is not subject to judicial notice.").[14]

B. The Facts Contained in Table 1.1 of the CCA Parties' Motion Do Not Satisfy the Requirements for Taking Official Notice

The CCA Parties request that the Commission take official notice "of the facts contained in Table 1.1" of their motion, which includes 2017 and 2018 load forecasts for five operational CCA programs and four potential programs they assert are anticipated to launch in 2017 or 2018.[15] This request should be rejected.

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[12] *Fremont Indemnity Co. v. Fremont General Corp.*, 148 Cal. App. 4th 97, 113 (2007) (citation omitted).

[13] *Mangini*, 7 Cal. 4th at 1063-1064 (quoting *Cruz v. County of Los Angeles*, 173 Cal. App. 3d 1131, 1134 (1985)).

[14] D.02-07-043 at 40.

[15] CCA Parties' Motion at 4-5.

First, the CCA Parties have not established that the facts included in Table 1.1 are relevant to an issue currently being considered in this proceeding. The CCA Parties' Motion includes very little detail on the purpose of their request for official notice. The CCA Parties merely reference Energy Division staff's concept paper, workshop, and requests for informal comments, argue that additional cooperation with CCA program representatives is warranted in light of expected CCA program growth and should be more clearly described in the IRP analytical framework, and claim (without further explanation) that "[t]he information contained in this motion will be useful for the Commission's Energy Division as it devises a regulatory and analytical framework for [IRP] in this proceeding."[16]

While the CCA Parties assert that "it is important that the information provided as part of this motion be adopted as part of the record in this proceeding,"[17] they have not met their burden of demonstrating relevance to the evidentiary record. The CCA Parties do not explain how the specific load forecasts in Table 1.1 are relevant to an issue currently being considered in this proceeding. Additionally, as the CCA Parties acknowledge, Energy Division staff's requests for comments on its concept paper and the IRP analytical framework presented at the workshop have been requests for ***informal*** comments. Thus, none of the parties' comments on these issues are "on the record" in this proceeding. The CCA Parties state that they "have responded to each opportunity to provide input on the process, and plan to remain actively involved in this proceeding."[18] Accordingly, the CCA Parties have had the same opportunity to provide input to Energy Division staff on these issues as other parties.[19]

It would not be appropriate for the Commission to take official notice of factual evidence introduced by the CCA Parties when no other party has had the opportunity to submit comments

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16 *Id.* at 1-3.
17 *Id.* at 3.
18 *Id*.
19 The CCA Parties made the same points about growth in CCA programs and the need for cooperation with CCA program representatives in the IRP process in their informal comments on the Energy Division staff's concept paper and their informal comments on Energy Division staff's proposed IRP analytical framework.

regarding the IRP framework on the record of this proceeding, much less had the chance to introduce testimony or other evidence. That is not an appropriate or fair use of a request for official notice. If and when the facts contained in the CCA Parties' Motion become relevant to an issue being considered in this proceeding, the CCA Parties should introduce such evidence into the record through testimony or another appropriate submission and such evidence should be subject to cross-examination by other parties.

Second, even if the facts contained in Table 1.1 were relevant, they do not meet the requirements for official notice. Although the CCA Parties cite Evidence Code Section 452(b), the load forecasts contained in Table 1.1 are not "[r]egulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States." Indeed, the CCA Parties have not even established that the documents they rely on to support Table 1.1 satisfy the requirements of Section 452(b).

Without any page citations to the numerous listed documents, the CCA Parties claim that links to the documents that support the facts for which they are requesting official notice are attached as Attachment A to their motion.[20] However, the CCA Parties do not explain how these specific documents meet the requirements for official notice. In fact, some of the documents listed to support Table 1.1 are clearly not regulations or legislative enactments of a public entity. For example, the document listed under Lancaster Choice Energy and one of the documents listed under Clean Power SF are Renewables Portfolio Standard procurement plans. Similarly, the draft CCA implementation plans and statements of intent listed for Redwood Coast Community Energy and City of Hermosa Beach[21] are labeled as drafts and do not include any resolutions adopting the implementation plans.[22] Additionally, the Joint Utilities note that the

[20] CCA Parties' Motion at 4.

[21] The Joint Utilities understand that the City of Hermosa Beach has adopted an ordinance approving its CCA implementation plan.

[22] While the CCA implementation plans and statements of intent for Peninsula Clean Energy, Silicon Valley Energy Authority, and Apple Valley Choice Energy reference resolutions adopting the implementation plans, those resolutions are not included in the documents at the links provided by the CCA Parties.

footnotes to Table 1.1 include the CCA Parties' understanding of the load forecasts for Mendocino County and City of Hermosa Beach, which are not supported by any documents.

Finally, even if the Commission were to conclude that the ***existence*** of any of the documents listed in Attachment A is a matter of which the Commission may take official notice under Evidence Code Section 452(b), the CCA Parties' request does not seek official notice of the existence of these documents. Instead, the CCA Parties request official notice of facts contained in the documents – *i.e.*, the load forecasts. As explained in Section II.A above, taking official notice of the existence of an official document of a governmental entity does not establish that the Commission should take official notice of the facts contained within that document.[23] Thus, the Commission may not take official notice of the load forecasts in Table 1.1 unless they are "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy" pursuant to Evidence Code Section 452(h).[24]

The load forecasts included in Table 1.1 are not facts that are not reasonably subject to dispute. Nor are they facts capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. It is not clear whether the potential CCA programs listed in Table 1.1 will launch on the dates projected in Table 1.1. None of these potential CCAs have submitted BNIs and it appears that one of their CCA implementation plans may not yet be approved. Moreover, even if all of these potential CCA programs do launch as anticipated in Table 1.1, the accuracy of the load forecasts for these potential CCA programs and the

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[23] *See Mangini,* 7 Cal. 4th at 1063-1064; *Fremont Indemnity Co.*, 148 Cal. App. 4th at 113; D.02-07-043 at 40.

[24] The CCA Parties cite *Shapiro v. Board of Directors of Centre City Development Corp.*, 134 Cal. App. 4th 170, 174 (2005) for the proposition that "[f]acts subject to official notice include the contents of City Council resolutions and similar documents that memorialize official actions of local government." CCA Parties' Motion at 3-4, n.8. In *Shapiro,* the court did grant a request for judicial notice of a certified copy of a City Council resolution. *Shapiro*, 134 Cal. App. 4th at 174 n.2. However, as noted above, the CCA Parties have not established that the documents they rely on are City Council resolutions or other regulations or legislative enactments of a public agency. Furthermore, there is no indication in *Shapiro* that the court took judicial notice of the facts contained in the City Council resolution.

operational CCA programs are not undisputed facts. The CCA Parties' Motion does not establish that the load forecasts included in Table 1.1 meet this high standard for judicial (or official) notice of facts. Accordingly, the CCA Parties' request for official notice of the facts contained in Table 1.1 should be rejected.

C. The List of Cities and Counties in the CCA Parties' Motion Does Not Satisfy the Requirements for Taking Official Notice

The CCA Parties also ask the Commission to take official notice of a list of 19 cities and counties that they claim "have passed resolutions or taken other formal action to explore CCA programs, or taken affirmative, formal steps to launch a CCA program within the 2017-2018 timeframe."[25] This request should be denied.

Just as with the facts included in Table 1.1, the CCA Parties have not demonstrated that their list of cities and counties is relevant to an issue currently being considered in this proceeding. The CCA Parties do not address why a list of communities that are exploring CCA programs is relevant to the Energy Division staff's development of an IRP framework. In addition, as explained in Section II.B above, all of the comments on this issue have been informal, and it would be inappropriate to take official notice of factual evidence introduced by the CCA Parties on an issue that is not even being considered on the record at this time.

Furthermore, the CCA Parties' list does not satisfy the requirements for granting official notice. The CCA Parties reference Evidence Code Section 452(b); however, their motion does not establish that all of the cities and counties included on the list have passed a resolution, regulation, or legislative enactment. A review of the documents listed in Attachment A suggests that at least some of the documents do not meet the requirements of Section 452(b). For instance, the documents listed for Alameda County, City of Solana Beach, and San Bernardino County are technical studies, not resolutions, regulations, or legislative enactments.[26]

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[25] CCA Parties' Motion at 6.

[26] Likewise, the document listed for San Luis Obispo County, County of Santa Barbara, and Ventura County is a Request for Proposals to develop a technical study.

Moreover, even if the Commission determines that it may take official notice of any of these documents, it should reject the CCA Parties' request for official notice of the list set forth in their motion. The list combines communities the CCA Parties claim are exploring CCA programs with communities they assert have taken formal steps to launch a CCA program within the 2017-2018 timeframe and includes no explanation of what specific actions each community has taken to explore or launch a CCA program, where they are in the process, what customers would be included, or the timing of any potential CCA program. Thus, even if it were appropriate to take official notice of the ***existence*** of any official actions taken by these communities, the CCA Parties' list does not include that information and the CCA Parties' Motion does not support the Commission granting that request.

Lastly, as explained in Sections II.A and II.B above, taking official notice of the existence of an official document does not establish the truth of the facts included within the document.[27] Nor have the CCA Parties met their burden to establish that their list constitutes "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy" under Evidence Code Section 452(h). The list does not even include an explanation of what actions were taken by each community. As such, the CCA Parties' request for official notice of the list of 19 cities and counties on page 6 of their motion should be rejected.

[27] *See Mangini,* 7 Cal. 4th at 1063-1064; *Fremont Indemnity Co.*, 148 Cal. App. 4th at 113; D.02-07-043 at 40.

III.

CONCLUSION

For all of the reasons stated above, the Commission should deny the CCA Parties' Motion.

Respectfully submitted,

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